

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES L. HARVEY, JR.
Claimant

VS.

**VERL DEAN CONARD and ANITA KAY
CONARD d/b/a D & K TRUCKING**
Respondents

AND

**KANSAS WORKERS COMPENSATION
FUND**

Docket No. 261,456

ORDER

Claimant requested review of the December 13, 2004, Award entered by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on June 7, 2005.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Edwin H. Bideau III, of Chanute, Kansas, appeared for Kansas Workers Compensation Fund. Robert E. Myers, of Columbus, Kansas, attorney for respondents, appeared not.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found that respondents did not have a gross annual payroll of more than \$20,000 for non-family employees in the calendar year

preceding the date of claimant's accident. Therefore, the Kansas Workers Compensation Act (Act) did not apply to the alleged employment, and no benefits were awarded.

The claimant appeals, claiming the ALJ erred in finding respondents did not have a gross annual payroll of more than \$20,000 and finding that the Act did not apply to the alleged employment.

The Kansas Workers' Compensation Fund submits that the order entered by the ALJ is correct and should be affirmed.

The parties agreed that the only issues for the Board's review are whether claimant was an employee of respondent or an independent contractor and whether the Act applies. Should the Board find that the claimant was an employee and that his employment with respondent fell within the jurisdiction of the Act, then the parties requested that the remaining issues, including the nature and extent of claimant's disability, be remanded for a determination by the ALJ.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that the ALJ's conclusion that the Act does not apply to this claim should be affirmed, but the Board reaches this conclusion for a different reason. The Board finds that claimant was an independent contractor and not an employee of respondents. Accordingly, claimant's accident and resulting injury did not arise out of and in the course of an employer/employee relationship with respondents.

Claimant was injured on November 3, 2000, while roofing a trailer house for the mother of Verl Dean Conard. The house was sitting on property owned by Mr. Conard, but Mr. Conard's mother owned the house. While up on the roof, claimant bent down to get a piece of plywood; and when he stood up, the wind caught him, spun him around and caused his back to twist.

At the time of claimant's accident, Mr. Conard owned D & K Trucking with his wife, Anita Kay Conard. He also owned D & K Pecans, which is allegedly an agricultural pursuit and thus exempt from the Act.¹ There does not appear to be any dispute about whether D & K Pecans is a separate business and an agricultural pursuit. Mr. Conard did not have separate checking accounts, and all business expenses were run through his personal checking account.²

¹See K.S.A. 44-505(a)(1).

²Conard Depo. (Apr. 24, 2004) at 24; Conard Discovery Depo. (Mar. 13, 2001) at 11.

Claimant testified that he was hired by respondents about two months before the accident to do odd jobs around the shop. He testified that he did some wiring for lights and progressed to working on diesels. He also testified he worked on a couple of the pecan trucks and tractors. He claims he was paid \$6.50 an hour and was paid by check. No taxes were withheld, and he never filled out a W-2 form. Claimant did not file an income tax return for 2000, claiming he did not make enough money.

Claimant stated that he had been asked by Mr. Conard's son, Larry Conard, to give an estimate on re-roofing Larry's shop. While he was at the shop talking to Larry Conard, Mr. Conard asked him to replace the roof on Mr. Conard's mother's trailer home. Claimant testified that Mr. Conard asked him if he would re-roof the trailer, and claimant agreed to do it. Mr. Conard bought the materials and provided most of the tools. Claimant testified Mr. Conard was going to pay him \$6.50 per hour. The second day into the roofing project, claimant fell and was injured.

Mr. Conard testified that claimant was not an employee of respondents. He stated that claimant did a few odd jobs. Mr. Conard testified that claimant was not paid on an hourly basis. Mr. Conard testified that he asked claimant about putting a roof on his mother's house, and claimant told him he would do it for \$700, with Mr. Conard providing the materials. Mr. Conard stated that he paid claimant for any work done for his mother, and his mother would reimburse him.

According to Mr. Conard, he did not carry workers compensation coverage because the business had no employees. All the truck drivers were contract labor and were paid on a percentage basis. Drivers were not told which routes to travel. Some drivers owned their own trucks, and some drivers leased trucks from respondent. Mr. Conard testified that he was the dispatcher for D & K Trucking. Drivers would call in to him to find out if he had any loads, or he would call them to find out if they wanted to make a run. It would be up to the driver whether he or she wanted to make a run. He had lease agreements for the trucks but did not have signed agreements with the drivers. Drivers did have to fill out applications, take drug tests and have pre-employment physicals to comply with Department of Transportation regulations and for insurance purposes. None of the truck drivers testified. The record contains only the testimony of Mr. Conard concerning the arrangements with the drivers.

Mr. Conard dealt mainly with two brokers. His arrangement with the brokers was that either Mr. Conard or a broker would tell a driver where and what time to pick up a load and where and what time to drop off the load.

Mr. Conard filled out Form 1099's for his drivers. Payments to drivers in the year 1999 and 2000 exceeded \$20,000. Mr. Conard testified these payments were not wages but were payments on contracts.

It is the claimant's burden of proof to establish his or her right to an award of compensation and to prove those conditions on which the claimant's right depends.³ Claimant's burden to prove coverage under the Act also includes whether respondent has the requisite payroll requirements as set forth in K.S.A. 44-505(a).⁴ The pertinent provisions of K.S.A. 44-505(a) provide as follows:

[T]he workers compensation act shall apply to all employments wherein employers employ employees within this state except . . .

. . . .

(2) any employment, . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees

Claimant testified that he was hired by Mr. Conard to work as a handyman full time at \$6.50 per hour for 40 hours a week. Claimant said he worked in that capacity for less than three weeks before this accident. Most of the work claimant was performing was not part of the regular business of D & K Trucking. The Board finds claimant was not an employee of Verl Dean Conard and Anita Kay Conard d/b/a D & K Trucking. Claimant was an independent contractor. The Board further finds that claimant was not working as an employee of respondents but, instead, as an independent contractor when he suffered his accident on November 3, 2000. Mr. Conard did not direct claimant on how to perform the roofing work on that home. Claimant was not paid an hourly wage. The Board accepts Mr. Conard's testimony that claimant bid the roofing job for a flat fee. Accordingly, claimant's accident and injury did not arise out of and in the course of his employment with respondents. As such, the Board need not reach the issue of whether the Act applies, specifically, whether respondents had a gross annual payroll of at least \$20,000, exclusive of Mr. Conard and his family, for the calendar year preceding claimant's accident.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated December 13, 2004, is affirmed.

IT IS SO ORDERED.

³*Hughes v. Inland Container Corp.*, 247 Kan. 407, 410, 799 P.2d 1011 (1990).

⁴*Brooks v. Lochner Builders, Inc.*, 5 Kan. App.2d 152, 154, 613 P.2d 389 (1980).

Dated this _____ day of November, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Robert E. Myers, Attorney for Respondents
Edwin H. Bideau III, Attorney for Kansas Workers Compensation Fund
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director